COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2017AP1773
2017AP1774

Cir. Ct. Nos. 2015TP332
2015TP333

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO S.T.E., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. E.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO A.M.E., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A. E.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 BRENNAN, P.J.[1] Tony[2] appeals from orders terminating his parental rights to two of his children, Susan and Mark, and from the post-disposition court's decision of February 9, 2018, denying his post-remand motion without an evidentiary hearing. Tony makes five arguments in support of vacating the orders: (1) the post-disposition court erred in denying his post-remand motion without an evidentiary hearing; (2) a CHIPS removal order created a "court-ordered and court-supervised substantial parental relationship" that made the grounds of failure to assume parental responsibility unlawful; (3) trial defense counsel was ineffective for not objecting that WIS. STAT. § 48.415(6) is unconstitutional as applied to him here because the State's removal of both children from his care made daily care *impossible*; (4) the evidence was insufficient to support the continuing CHIPS grounds in his son's case; and, (5) he is entitled to a new trial in the interest of justice.

¶2 We reject his claims and affirm for the reasons following.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Because the parents and children have similar initials, identifying the parties by initials as we normally do would risk confusion for the reader. For that reason, we have substituted pseudonyms for ease of reading per WIS. STAT. § 809.19(1)(G). Throughout this decision, the father, A.E., will be referred to as Tony; the mother, A.A.S., as Angela; their daughter, S.T.E., as Susan; and their son, A.M.E., Jr., as Mark.

BACKGROUND

¶3 Susan is now a six-year-old girl. She was born on January 22, 2012, and removed from the home on January 1, 2014, when another child of Tony and Angela died while in Angela's care.[3] The autopsy showed that the child had suffered severe injuries for which there was no explanation. It was determined that Tony had access to the child and was actively involved in the child's life. When Susan was removed from the home, her placement was kept undisclosed due to the severity of her deceased sibling's injuries and concern about domestic violence in the home. Additionally, there were concerns about Tony's controlling behavior over Angela, such as not allowing her to go to the bathroom, but instead requiring her to go to the bathroom in a bucket.

¶4 On April 30, 2014, Susan was determined to be a child in need of protection or services. Tony stipulated to the terms of the dispositional order at the dispositional CHIPS hearing on July 7, 2014.

¶5 Mark is now a three-year-old boy. He was born on January 22, 2015,[4] after Susan had been removed due to the reasons stated above.

¶6 On March 11, 2015, Tony was defaulted at a settlement conference for failing to appear and at the same time the court found Mark was a child in need

[3] This appeal concerns only the orders terminating Tony's parental rights. Angela consented to the voluntary termination of her parental rights as to both children on June 2, 2016.

[4] The Petition for Termination of Parental Rights (TPR) for Mark lists his date of birth as January 22, 2015, as does the TPR order appealed here. The State's appellate brief identifies his date of birth as October 22, 2015. Despite the remarkable similarity of the children's dates of birth—both being born on January 22, albeit three years apart—we assume the Petition and Orders to be correct. No party has mentioned the discrepancy in their brief.

of protection and services. On May 4, 2015, Tony appeared in court and stipulated to the terms of the dispositional order.

¶7 A TPR petition was filed on November 30, 2015, regarding both children, alleging three grounds: failure to assume parental responsibility, continuing CHIPS, and abandonment. The grounds phase trial with testimony occurred from October 24 to October 27, 2016. At the conclusion of the grounds trial on October 28, 2016, by written decision, the court found that Tony had failed to assume parental responsibility for both children, both *before* and *after* removal of the children from the home. Additionally, as to Mark, the court concluded that the State had proven continuing CHIPS and abandonment. Ultimately there was a dispositional hearing with testimony taken starting on October 28, 2016. It was adjourned due to Tony's change of counsel to February 23, 2017, and was concluded on June 9, 2017. The court issued a written decision dated June 13, 2017, terminating Tony's parental rights to both children.

¶8 Tony filed a Notice of Appeal on September 8, 2017, and subsequently filed a post-remand motion raising the same issues he does on appeal. A remand hearing was scheduled for February 9, 2018, but after briefing the court, by written decision dated February 9, 2018, denied the motion without a hearing. This appeal follows.

DISCUSSION

I. WISCONSIN STAT. § 809.107(6)(am) does not require the circuit court to conduct an evidentiary hearing on a postjudgment motion.

¶9 Tony first argues that the circuit court erred in denying his post-remand motion without an evidentiary hearing. He contends that WIS. STAT.

§ 809.107(6)(am) and this court's remand order require the circuit court to conduct an evidentiary hearing following remand. He is incorrect on both counts. When interpreting a statute, we first look at the plain meaning of the words of the statute, seeking to determine the legislature's intent. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is plain, we stop the inquiry. ***Id.***, ¶45.

¶10 We note first that Tony misreads this court's order dated October 23, 2017. It did not order that an evidentiary hearing be held. It simply remanded to the circuit court to address Tony's postjudgment motion and to hold *whatever proceedings were necessary* to decide the motion. The order stated:

> IT IS ORDERED that the record is remanded to the circuit court for the purpose of addressing the appellant's postjudgment motion. WIS. STAT. RULE 809.107(6)(am). The postjudgment motion shall be filed within ten days of the date of this order. The circuit court *shall hold necessary proceedings* and decide the motion within thirty days of the date it is filed.

(Emphasis added.) That is precisely what the circuit court did. It determined that no hearing was necessary after briefing and specifically said: "As the parties are aware, I cancelled the hearing on Mr. Findley's remand motion. In my view, the record 'conclusively demonstrates that the defendant is not entitled to relief.'" (Citing without attribution to ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.) The court went on to conclude that "[t]he motion is without merit on its face. There is and was no need for post-disposition fact finding."

¶11 Tony then argues that the words of the statute itself require an evidentiary hearing. It is clear and unambiguous that the statute's words do *not* require that the circuit court hold a fact-finding hearing. Rather, the statute requires only that *if* the court of appeals grants the motion for remand, *it must set*

time limits for the circuit court to hear and decide the issue. WIS. STAT. § 809.107(6)(am) states:

> *Motion for Remand.* If the appellant intends to appeal on any ground that may require postjudgment fact-finding, the appellant shall file a motion in the court of appeals, within 15 days after the filing of the record on appeal, raising the issue and requesting that the court of appeals retain jurisdiction over the appeal and remand to the circuit court to hear and decide the issue.… **If the court of appeals grants the motion for remand, it shall set time limits for the circuit court to hear and decide the issue**, for the appellant to request transcripts of the hearing, and for the court reporter to file and serve the transcript of the hearing. The court of appeals shall extend the time limit under par. (a) for the appellant to file a brief presenting all grounds for relief in the pending appeal.

Id. (emphasis added). Here the circuit court did exactly what the statute requires. It set time limits for a decision, set a briefing schedule, read the briefs, and made a decision.

¶12 Tony concedes that there is no case law that supports his position. He bases his argument entirely on his interpretation of the above-quoted statutory language. He also concedes that there are criminal cases that reach the contrary conclusion, but states conclusorily and without analysis that they somehow do not apply. ***Id.*** In fact, because WIS. STAT. § 809.107(6)(am) applies to all appeals, the criminal cases he mentions, without actually citing (but which we address below), are precedent for our interpretation of the statute as not requiring a fact-finding hearing.

¶13 As the State correctly points out in its brief, Wisconsin case law clearly sets forth the standard for when the circuit court must hold a hearing on a postjudgment motion in ***Allen***, 274 Wis. 2d 568, ¶9, and ***State v. Bentley***, 201Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). A postconviction motion may be denied

without a hearing if it fails to raise sufficient, non-conclusory facts or if the record itself demonstrates that the appellant is not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Whether the motion alleges sufficient facts to warrant an evidentiary hearing is a matter for the circuit court's discretion. *See* ***Bentley***, 201 Wis. 2d at 309. Tony makes no argument that the circuit court abused its discretion in any way other than interpretation of the statute, which is a matter we review independently of the circuit court. And here, WIS. STAT. § 809.107(6)(am) plainly does not require an evidentiary hearing. Therefore the circuit court did not err in deciding Tony's post-remand motion without an evidentiary hearing.

II. The entry of a CHIPS removal order does not prevent a failure to assume parental relationship finding.

¶14 Tony's second argument is that, as a matter of law and statutory construction, the failure to assume parental responsibility grounds in WIS. STAT. § 48.415(6) cannot be the basis for termination of parental rights when a CHIPS removal order has been entered. He correctly notes that an element of the failure to assume ground is that the parent has not "had a substantial parental relationship with the child." Sec. 48.415(6)[5] But he then argues, without any legal authority,

[5] WISCONSIN STAT. § 48.415(6), the failure to assume parental responsibility statute reads:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(continued)

that removal under a CHIPS order makes having a "substantial parental relationship" *impossible*. In the absence of legal authority, he relies on his own interpretation of "substantial parental relationship" in § 48.415(6)(b). Because a CHIPS order removes the child from the home and states conditions of return, he argues, it makes it impossible for a parent to assume a substantial parental relationship.

¶15 There are several problems with this argument. First, the same CHIPS order imposes parental responsibilities on a parent, clearly indicating that the parent continues to have parental duties and a "substantial parental relationship." But secondly, and more directly, we do not address unsupported arguments. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994); *see also*, ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App 1992) ("Arguments unsupported by references to legal authority will not be considered.").

> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Id.

III. WISCONSIN STAT. § 48.415(6) is not unconstitutional as applied here.

¶16 Tony's third argument is that his trial counsel was ineffective for failing to argue that WIS. STAT. § 48.415(6) is unconstitutional as applied to him. He contends that the CHIPS removal order made it "impossible" for him to assume a substantial parental relationship and for that reason, the failure to assume grounds here were unconstitutional as applied. For this argument, he relies solely on ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶51, 293 Wis. 2d 530, 716 N.W.2d 845. There are two items of note with regard to Tony's framing of the issue. First, he argues only that the failure to assume grounds, not the continuing CHIPS or abandonment grounds, are unconstitutional as applied. And second, he develops no constitutional argument other than citing ***Jodie W.*** We do not develop arguments for counsel. *See* ***Pettit***, 171 Wis. 2d at 646.

¶17 The constitutionality of a statute is a question of law that we review independently of the circuit court. Statutes are presumed constitutional. ***Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶18, 237 Wis. 2d 99, 613 N.W.2d 849.

¶18 Tony's reliance on ***Jodie W.*** is misplaced. ***Jodie W.*** is distinguishable both on the law and the facts here. Jodie W. was incarcerated during her TPR case. ***Jodie W.***, 293 Wis. 2d 530, ¶4. Tony was not incarcerated. Secondly, the grounds that the court found unconstitutional in Jodie W.'s case were continuing CHIPS, WIS. STAT. § 48.415(2)(a), unlike here where the challenged grounds are failure to assume, WIS. STAT. § 48.415(6). The holding in ***Jodie W.*** is very narrow and does not apply to the facts here:

> We therefore conclude that in cases *where a parent is incarcerated* and the *only ground* for parental termination is that the child continues to be in need of protection or

> services solely because of the parent's incarceration, WIS. STAT. § 48.415(2) requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child.

Id., ¶51 (emphasis added).

¶19 Contrary to Tony's argument, ***Jodie W.*** does not stand for the proposition that where a parent is not incarcerated, the failure to assume grounds in WIS. STAT. § 48.415(6) are unconstitutional as applied. The leap he makes from the ***Jodie W.*** holding to this case is unsupported. Consequently, his trial counsel's failure to argue that the statute is unconstitutional as applied here cannot be deemed deficient. "It is well-established that trial counsel could not have been ineffective for failing to make meritless arguments." ***State v. Allen***, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245.

IV. The evidence was sufficient to support the continuing CHIPS grounds.

¶20 Tony next argues that with regard to his son, Mark, the circuit court erred in ruling that there was sufficient evidence to support the grounds of continuing CHIPS.[6] His argument is based on one statement made during the testimony of the case worker, Ms. Perry, that Tony "completed all of the services" required of him. This, he argues, amounts to a concession that he met the conditions of return and thus, the evidence was insufficient to prove the grounds of continuing CHIPS.

[6] The circuit court found the evidence sufficient to prove three grounds as to Tony's son, Mark—failure to assume, continuing CHIPS, and abandonment. We address this argument in the interest of completeness, noting that even if the evidence were insufficient on this ground, the other grounds supported the court's order terminating Tony's parental rights to his son. We note further that as to his daughter, Susan, the court found only the grounds of failure to assume.

¶21 We review the sufficiency of the evidence under a well-established standard of review set forth in WIS. STAT. § 805.17(2): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." ***Id.*** Tony is not challenging any of the trial court's factual findings, but rather the weight given to them. On review, we may not "substitute [our] judgment for that of the trier of fact, unless the evidence is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶22 Tony's argument is undeveloped and without support in the record. The social worker's testimony was about "services" offered to Tony to help him meet the conditions of return. It is true that she testified that he completed the "services," but she also testified that he failed to complete the conditions for return. Tony does not mention this. The only argument he makes is that the evidence fails to prove the third element of continuing CHIPS under WIS. STAT. § 48.415(2). But the third element requires proof of meeting the conditions, not attending services. The statute's third element states: "that the parent has failed to meet the conditions established for the safe return of the child to the home." WIS. STAT. § 48.415(2)(a)3. As noted, the witness's statement has nothing to do with "conditions established for the safe return of the child to the home."

¶23 Additionally, as the State points out further, the social worker testified that even after Tony finished the services, there was no change in his behavior. He did not seem to know who was safe and suitable to be around his children. He still continued to live with Angela, who he knew was not emotionally or mentally stable, and who had not engaged in any of the services for her mental or emotional health. And they had a new baby that they were parenting

together. The social worker testified that unsupervised visits would not be allowed as long as Tony lived with Angela due to safety concerns for Susan and Mark. Tony fails to even attempt to contradict the State's proof of failure to meet the conditions of the CHIPS order. Accordingly, we conclude that the circuit court's finding of continuing CHIPS was supported by sufficient credible evidence.

V. The real controversy was fully and fairly tried.

¶24 Tony's final argument is that he is entitled to a new trial under WIS. STAT. § 752.35 because the real controversy was not fully and fairly tried. He bases this argument on the previous four. Because we conclude that his previous arguments do not have merit, we likewise conclude that this argument lacks merit.

CONCLUSION

¶25 Accordingly, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.